

No. 10975.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

LAWRENCE HAZARD,

Appellant.

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;
WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBI-
CAM INC., a corporation; and GOODYEAR TIRE & RUB-
BER CO. INC., a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

APR 2 1945

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Jurisdiction.

Jurisdiction of the trial court was conferred by the copyright laws of the United States of America, and particularly by Title 17, U. S. C., Section 34. [Tr. p. 3.]

The final judgment of the District Court from which this appeal was taken was entered September 25, 1944. [Tr. p. 255.]

Notice of appeal was served and filed in the District Court on December 22, 1944. [Tr. p. 255.]

The complaint on file alleges, in paragraph VII thereof, that on or about May 28, 1932, plaintiff complied in all respects with the provisions of the Copyright Act of 1909,

as amended, and particularly with the provisions of Section 11 of said Act, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said dramatic composition, and received from the registrar of copyrights a certificate of registration dated and identified: "May 28, 1932, Entry: Class D2, No. 16584." [Tr. p. 5.]

The allegations of the aforesaid paragraph VII of the complaint were admitted to be true by written stipulation of the parties. [Tr. p. 44 (par. 1 of stipulation).]

It was also stipulated that the record on this appeal constitutes a full, complete and true record of the entire proceedings had at the trial, and that all documents, records and instruments attached to the stipulation are true and correct copies thereof. [Tr. p. 256.] The trial court approved and certified said record to the Circuit Court of Appeals as the record on appeal. [Tr. p. 257.]

Jurisdiction to review the judgment of the court below is conferred by Title 28, Section 225, U. S. C. A., and particularly subdivision (a) thereof.

Statement of Case.

Lawrence Hazard, plaintiff in this action, who will also be referred to hereinafter from time to time as "appellant," created and wrote an original dramatic composition entitled "A Man's Castle."

Said dramatic composition contains a large amount of material wholly original with plaintiff. On or about May 28, 1932, in compliance with the Copyright Laws of the United States, plaintiff copyrighted this original work. Since May 28, 1932, plaintiff has been and still is the sole proprietor of all rights, and of all title and interest, in

the copyright of said dramatic composition, excepting such of said rights as he may have parted with under the terms of a license agreement in writing between him and Columbia Pictures Corporation of California, Ltd., dated the 25th day of March, 1933. [Tr. p. 36.]

Said license agreement was prepared by said Columbia Pictures Corporation of California, Ltd upon its own printed form. [Tr. pp. 44-45.]

Thereafter, Columbia Pictures Corporation of California, Ltd. produced a motion picture photoplay entitled "A Man's Castle" [Tr. p. 45], pursuant to the license given to it under said license agreement, and which was based upon plaintiff's original dramatic composition of the same name. The motion picture script from which the photoplay is made is set forth at length in the transcript, pages 47-223, inclusive.

Prior to February 12, 1944, Columbia Pictures Corporation of California, Ltd., a California corporation, was merged with Columbia Pictures Corporation under the name of "Columbia Pictures Corporation." [Tr. p. 45.]

On February 10, 1944, Columbia Pictures Corporation entered into an agreement in writing with defendant Walter Pidgeon [Tr. p. 45], a true and correct copy of which said agreement is set forth in the transcript, pages 224 to 226, inclusive. By the terms of said agreement, Columbia Pictures Corporation, among other things, granted the said Walter Pidgeon a license to make two radio broadcasts based upon said motion picture photoplay.

Walter Pidgeon had theretofore entered into a contract with defendant Young & Rubicam Inc., under the terms of which Walter Pidgeon was employed to secure the

necessary assistance—other than the guest star—and to arrange for, produce and act in a radio play to be broadcast over the facilities and from the studio of defendant Columbia Broadcasting Systems, Inc., Young & Rubicam Inc. acting for and on behalf of the corporation sponsoring the program. The program was broadcast on February 20, 1944, from the Hollywood studios of the Columbia Broadcasting System over a national hook-up comprising 131 stations. The duration of the program was one-half hour, and a full, true and correct script thereof is attached to the complaint [Tr. pp. 45-46], and marked Exhibit 2 thereof. [Tr. pp. 7-32.]

The introduction of the radio broadcast announced: "The star — Loretta Young — and the story—'A Man's Castle'—and your host, Walter Pidgeon. . . ." [Tr. p. 7.]

Upon thus being introduced, Walter Pidgeon then announced over the radio: ". . . The story is 'A Man's Castle' . . ." [Tr. p. 8.]

Plaintiff contends that the broadcast over the radio amounted to a violation of the license agreement and constituted an infringement of his copyright.

This action is for an injunction restraining said infringement and for damages claimed to have been sustained by plaintiff by reason thereof and for an accounting for all gains, profits and advantages derived by defendants from said infringement, and for other equitable relief and for plaintiff's costs and reasonable attorneys' fees.

By stipulation of the parties and by order of the trial court, no evidence was offered or introduced with respect

to the question of damages. In this connection, the trial court stated: ". . . if I hold for plaintiff, I will set down as early a date as possible to determine the damages." [Tr. p. 236.]

Judgment was given by the trial court against the plaintiff and in favor of defendants with costs. This appeal is taken from that judgment.

Although admitting the existence of certain limited rights of defendants to broadcast, it is plaintiff's position that the particular broadcast here involved exceeded those limited rights, and was in violation of the license agreement and hence constituted an infringement of his copyright.

As heretofore pointed out, the agreement was prepared by Columbia Pictures Corporation of California, Ltd. upon its own printed form [Tr. pp. 44-45] and hence is to be strictly construed against defendants, the rights of all of whom flow only from that license agreement.

The first two paragraphs of article (1) [Tr. pp. 36-37] and article (3) [Tr. p. 39], both of the license agreement, contain the only provisions embodied in the agreement directly relating to broadcasting rights.

The motion picture photoplay "A Man's Castle" was admittedly an adaptation of plaintiff's original dramatic composition. [Tr. p. 34.]

The radio version was admittedly based upon the same original dramatic work, but since the motion picture version was likewise based upon the original dramatic work, it necessarily follows also that the radio adaptation followed both the original dramatic work and the motion picture adaptation thereof. [Tr. pp. 34-35.]

Specification of Errors.

(1) Under the license agreement dated March 25, 1933, appellant did not grant any license or right to broadcast by radio any complete play based upon a dramatic composition "A Man's Castle," or to make any other radio broadcast thereof, excepting upon the very limited and restricted conditions provided in said contract, and the trial court erred in interpreting said contract to the contrary.

(2) The broadcasting activities carried on by appellees were conducted in violation of the aforementioned contract, and the trial court erred in refusing to so hold.

(3) The trial court erred in denying appellant the right to introduce in the trial court, as evidence in the case, Plaintiff's Exhibit No. 1 for Identification, which appears at length in the transcript of record on appeal, pages 241 to 247, inclusive, thereof, which exhibit is a form of assignment of all rights used by appellee Columbia Pictures Corporation of California, Ltd. where all rights are granted to said corporation, including general radio broadcasting rights—not being limited to the narrow rights covered by the license agreement involved here. The trial court's refusal to allow the introduction of said document constitutes prejudicial error to the appellant.

(4) Finding IX of the Findings of Fact, to wit: "The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work . . ." [Tr. p. 252] is not based on or

supported by any evidence, and the trial court erred in so finding.

(5) The trial court erred in its Conclusions of Law [Tr. p. 253; in stating: ". . . that the defendants did not by said radio broadcast infringe the copyright of the plaintiff in the manner set forth in the complaint, or otherwise, but on the contrary were expressly authorized and empowered by license from the plaintiff so to do, and plaintiff is entitled to take nothing by his complaint herein."

Summary of Argument.

Defendants' broadcasting activities were in violation of the licenses granted under the license agreement dated March 25, 1933.

A. The extent and character of the broadcast exceeded the license granted under articles (1) and (3) of the agreement; and

B. The general language of the license agreement clearly shows that the agreement did not authorize the broadcasting of an entire play, but only permitted broadcasting of sketches of the motion picture version of appellant's original dramatic work.

II.

The trial court erred in refusing to admit in evidence Plaintiff's Exhibit 1 for Identification.

ARGUMENT

I.

Introduction to Argument.

Although in some respects this action is similar to the ordinary plagiarism suit, it is to be particularly noted that there is one outstanding difference, to wit: that in the ordinary plagiarism action it is incumbent upon the plaintiff to prove that not only the infringing and infringed works were similar but also that the defendants had access to the infringed work and that they actually indulged in copying; whereas, in the instant case it is admitted [Tr. pp. 44-45] that the original work, the motion picture and the radio play all bore the same title, to wit: "A Man's Castle"; that the motion picture was in fact based upon plaintiff's original work by virtue of the terms of the license agreement, and that the radio play looked for its source to the same work, although it was made from the motion picture. [Tr. p. 224.]

Appellant's rights, then, are to be determined by a proper interpretation of the license agreement.

If the broadcast was in violation of the license agreement, the trial court's ruling must be reversed.

This is the theory upon which the case was tried, as is shown by the language of the court and that of Mr. Knupp, attorney for appellees, which appears at the bottom of page 229 and top of page 230 of the transcript, as follows:

"The Court: Gentlemen, let me ask a few questions, which perhaps will clarify this matter. Is there any dispute over this fact. That if there had been no contract in this case, that the radio adapta-

tion as you call it, would have been an infringement of the copyright of the original play?

Mr. Knupp: I don't think there is any question about that, if the Court please. I think that is shown clear enough by a comparison between the radio adaptation and the story.

The Court: That was my conclusion in reading the different scripts submitted to me.

Mr. Knupp: That is right.

The Court: Then it comes down to the real question here of an interpretation of the contract—isn't that the real issue in the case?

Mr. Loewenthal: That is right. We are agreed on that. . . ."

In other words, we have here but to refer to the language of the contract itself—and this phase of the problem which is presented to this court upon appeal is solely one of determining the proper interpretation of that contract, the license agreement of March 25, 1933.

For the purpose of this argument, the license agreement should be analyzed and considered in two separate aspects, to wit:

- A. The effect of the language contained in articles (1) and (3); and
- B. The effect of the general language contained in other portions of the contract;

and the arguments hereinafter presented will be directed to those two phases in the order named.

A. DEFENDANTS' BROADCASTING ACTIVITIES WERE IN VIOLATION OF ARTICLES (1) AND (3) OF THE LICENSE AGREEMENT.

The granting clauses of the contract are contained in the first two paragraphs of article (1) thereof [Tr. pp. 36-37], and read as follows:

"1. The Owner(s) hereby grant(s) sell(s) assign(s) and sets(s) over to the Purchaser, forever, *the entire motion picture rights*, including the silent and/or sound and/or talking and/or musical, (in all languages), *motion picture rights* (all such rights being hereinafter included and embraced in the expression '*motion picture rights*'), for the entire world, in and to a certain dramatic work entitled 'A MAN'S CASTLE' written by Lawrence Hazard (hereinafter called the 'Author(s)') the title and theme thereof, exclusively, together with all of the benefits of the copyrights in such work and of all remedies for enforcing such copyrights with respect to such *motion picture rights*.

The Owner(s) hereby grant(s) to the Purchaser the exclusive right to make *motion picture versions* and silent and/or sound and/or talking and/or musical *motion picture versions* of such work (*all such versions* being hereinafter included and embraced in the expression '*motion picture versions*'), to translate, adapt, arrange, change, transpose, add to and subtract from such work and the title thereof to such extent as the Purchaser may deem expedient, to use excerpts from such work for the title, sub-titles, text and dialogue of such *motion picture versions*, to *publish*, for the purpose of advertising and exploiting such *motion picture versions*, in such form as the Purchaser may deem advisable, including its publication

in newspapers, fan magazines and trade periodicals, a synopsis or story of such *motion picture versions*, not exceeding, however, ten thousand words in length, to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and all other mediums of advertising and publicity whatsoever, *to broadcast sketches of such motion picture versions*, to use parts of such work or of the theme thereof in conjunction with other work or works in the making of motion picture versions, and the exclusive unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such *motion picture versions*, and to secure copyright and copyright registration therein in all countries of the world in Purchaser's name or otherwise." (Emphasis added.)

The contract then goes on, in the third paragraph of article (1) to appoint Columbia Pictures as the agent of the author, to enforce and protect "*such motion picture rights* . . . ; and to prevent the *infringement thereof*"

Article (3) of the contract [Tr. p. 39] then goes on to define what rights were intended to be covered in article (1) in the granting clause, and the language of that article (3) is as follows:

"3. *The motion picture rights herein granted and assigned* to the Purchaser by the Owner(s) include the exclusive right to make and use disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of the sound and talking and musical and other audible portions of *any such motion picture versions* and for the reproduction and performance of all such sounds as

part of or incidental to the exhibition thereof, and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed." (Emphasis added.)

By the provisions of the foregoing quoted portions of article (1) of the license agreement, the author granted the entire motion picture rights, and then state that all such rights are in effect thereafter in the contract to be referred to by the expression "motion picture rights." In the third paragraph of the same article, Columbia Pictures is given the right to enforce and protect "such motion picture rights." Article (3) permits the broadcasting of "*motion picture versions*" as one of the incidental rights covered by the expression "*motion picture rights*." In other words, the expression "*motion picture rights*" included in the granting clause is the broader and more comprehensive term, and describes the entire or whole of all of the rights granted; whereas, the expression "*motion picture version*" is the more narrow and more restricted term and describes only a part of said whole or entire rights. Therefore, since the right to broadcast under article (3) of the license agreement is limited to a broadcast of "*motion picture versions*" (a part only of the whole), it cannot be argued that such broadcasting privileges apply to all the "*motion picture rights*" but apply only to that part of the "whole" expressly referred to, that is, "*motion picture versions*."

We have been unable to find a satisfactory definition of the expression "*motion picture version*," nor does the contract itself throw much light upon the meaning of that expression.

California Civil Code, Section 1644, is pertinent here in aiding in the interpretation of this contract, and reads as follows:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

There is nothing in the license agreement, nor was any evidence introduced by defendants at the trial, to indicate or prove that the expression "*motion picture versions*" had been used in the contract, or was known in the motion picture industry in a technical sense, or had a special meaning given to it by usage. Therefore, the court is bound to accept that expression in its ordinary or popular sense. In plaintiff's pre-trial brief, filed with the trial court prior to the trial of this action, we referred the trial court to the definition found in Webster's Dictionary, and we now cite a part of that definition, as follows: "3.—An account from a particular point of view, esp. as contrasted with another account, as, two versions of the same affair." The trial court, at the time of the decision in this case, accompanied the decision with a "memorandum opinion," wherein it is stated [Tr. p. 249]:

"In this case we have the author's story as represented by his script, while on the other hand we

have a version of the same affair as produced and developed by Columbia Pictures. It was this version that was broadcasted and it is my opinion the plaintiff granted the right to do so."

We submit here that what the trial court completely overlooked was the fact that it is physically impossible to broadcast a motion picture version. What in fact was broadcast, and the only thing that could possibly have been broadcast, was the radio version. What actually was done here was that a motion picture adaptation was made from plaintiff's original work. Thereafter Columbia Picture actually produced and exhibited a motion picture photoplay based upon that adaptation. Thereafter defendant Walter Pidgeon and the other defendants re-adapted plaintiff's original work, condensed it and thereafter produced it over the radio in a performance that lasted one-half hour. The writer of the radio script took the characters, plot and the continuity from the motion picture script and then condensed it and adapted it to be broadcast by radio facilities, which obviously are different from the facilities by which motion pictures are produced and exhibited.

The continuity, plot and characterizations in the radio adaptation, or "version," were substantially the same as the continuity, plot and characterizations of the motion picture adaptation, or "version," and the continuity, plot and characterizations of the motion picture adaptation, or "version," were substantially the same as the continuity, plot and characterizations in the original manuscript. It therefore follows that what was actually broadcast was primarily the continuity, plot and characterizations of the original work.

In commenting upon the definition of the word "version" in Webster's Dictionary, the trial court concluded that there were exactly *two* "versions" here involved. We urge, however, that the court erred in this conclusion, in that it should have found either (a) that there was but one "version," to wit: the original version, and that the motion picture and radio vehicles were but two separate adaptations of that version; or (b) that there were three versions, to wit: the original version, the motion picture version and the radio version.

If "version" is to be considered as synonymous with "continuity," "plot" and "characterizations," then clearly there was but one version, and that was not a "*motion picture version*" but rather the version set forth in plaintiff's original manuscript.

On the other hand, if the word "version" is to be considered as involving or embodying scenery, sound equipment, dialogue and physical facilities employed in the exhibition of the story, then, when we consider that it became necessary, because of the very difference in the nature of radio and motion picture exhibitions that totally different facilities be employed, it is obvious that what was broadcast over the air was not a "motion picture version" at all but was strictly and exclusively a "radio version."

Under any or all of the foregoing contingencies, the broadcasting of plaintiff's original play was not autho-

rized by either articles (1) or (3) of the license agreement.

Now, article (1) of the license agreement only permits broadcasting of "sketches" of the motion picture version. Of this there can be no argument. Reference to the radio script, however [Tr. pp. 7-35], clearly shows that a whole play was broadcast — not just a "sketch." Therefore, even if it be held that the broadcast involved here was a broadcast of the "motion picture version," nevertheless it was in violation of article (1), because it was not merely a "sketch" but was a complete play, commencing substantially with the sequence with which the motion picture script commenced, and including practically all the sequences involved in that script; and finally ending substantially with the same sequence as the motion picture script.

In conclusion, then, with respect to this phase of the argument, appellant contends:

- (1) That the broadcast violated the license granted under article (3), in that what was broadcast was not the "motion picture version" at all; and
- (2) That the broadcast violated the license granted under article (1), in that it was a broadcast of an entire play rather than a "sketch"; and that even if it be held that the broadcast was a "sketch," still under article (1), as well as under article (3), the scope of the broadcast went far beyond the "motion picture version."

B. THE GENERAL LANGUAGE OF THE CONTRACT, WHEN
CONSIDERED IN CONNECTION WITH ARTICLES (1)
AND (3) THEREOF, DID NOT PERMIT THIS BROAD-
CAST.

Although the arguments heretofore made respecting articles (1) and (3) are of necessity also involved here, we shall not repeat those arguments, but merely ask that the court bear them in mind in connection with the following argument:

Article (2) sets forth the warranties of the author, plaintiff in this action, in respect to "the *motion picture rights* in such work . . ."; and

" . . . that the *motion picture rights* have in no way been sold . . .; that the reproduction and exhibition of such work in the form of *motion picture versions* will not in any way infringe upon any rights of any party whomsoever; that the Owner(s) (has) (have) done no act or thing that can in any way prevent or interfere with the full enjoyment by the Purchaser of the rights hereby acquired.

The Owner(s) agree(s) and guarantee(s) to defend, indemnify and hold the Purchaser harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against the Purchaser by reason of the use of the title of such work *for the title of any such motion picture versions*, or of any infringement of any copyright or common law rights or any *literary, dramatic musical or motion picture rights*, on account of any use which the Purchaser may make of such work *in the making of the motion picture versions thereof, the distribution, exhibition or other disposition of such motion picture versions, or the*

exercise or attempted exercise of any of the rights hereby granted.

The warranties contained in this article *apply only to the material used in such motion picture versions* taken from such work written by the Author(s) and do not in any way apply to any extraneous matter inserted by the Purchaser *in such motion picture versions.*" (Emphasis added.) [Tr. pp. 36-38.]

The court is bound to take notice of the minute and careful language used throughout the contract in describing the enumeration of rights which Columbia Pictures acquired thereunder, and it is absolutely inconceivable that the company would have failed to include general broadcasting rights by the use of concise and adequate language to that effect, if it had intended that the contract should cover such rights. In this connection, it is of importance to note that nowhere in the contract, either in article (1) or article (3) thereof, is there any independent right to broadcast, and that wherever reference is made to broadcasting rights, such reference is limited: in article (1) to *broadcasting sketches of such motion picture versions*; and in article (3) to *broadcast such motion picture versions.*

Compare this with the language in the printed form of contract used by Columbia Pictures Corporation of California, Ltd. as set forth in Plaintiff's Exhibit 1 for Identification [Tr. pp. 241-247] where the purchaser is given full right and title in the "work" for all purposes whatsoever,

" . . . and including also under such grant sale and assignment, without in any way limiting or re-

stricting, the same, the entire literary, publication, novelization, dramatization, performing, mechanical reproduction radio and other broadcasting, television and silent, sound, talking and/or musical motion picture rights therein for all countries of the world and in all languages and any and all other rights of any character that may hereafter be invented, discovered or come into existence." [Tr. p. 242.]

Note further that the author warrants that he is the sole owner of ". . . all rights of every character in such work and has full right and authority to grant the rights hereby conveyed." [Tr. p. 244.]

From the foregoing quoted portions of Plaintiff's Exhibit 1 for Identification, it becomes clear that under their so-called "all rights" contract, where it is actually intended that Columbia Pictures shall acquire broad radio rights, concise and adequate language is embodied in their contract, so that there can be no misunderstanding about the scope of their licenses or privileges.

Incidentally, as will be more fully argued hereafter in this brief, because of the contrast in the two forms of contract and as an aid in interpreting the license agreement, the trial court should have admitted Plaintiff's Exhibit 1 for Identification in evidence.

The transcript does not contain a copy of plaintiff's original manuscript but it does contain copies of the motion picture and radio scripts. The failure to include the manuscript of the original work was not due in any sense to oversight. The omission resulted from the fact that since, admittedly, the motion picture script was based upon the manuscript of the original work, and since the radio script was based upon the motion picture

script, no useful purpose would have been served in cluttering the record on appeal unnecessarily with voluminous copy.

At the expense of being repetitious, it is again urged here that it would have been an exceedingly simple matter for the drafters of this contract to include the general right of broadcast if the parties to the contract had had the slightest intention that those rights were to be included in the grant.

It is also enlightening to note that in the warranty clause contained in article (2), the author merely warranted that he was the owner of "*the motion picture rights*," and that he had authority to "*grant the rights hereby conveyed*." In this same connection, and included within the same article of the contract, the author warrants "*that the motion picture rights*" had not been previously disposed of; and again, in the same article, guaranteed the purchaser against loss or damage which may be sustained by the latter by reason of its use of the title in "*any such motion picture versions*," or of any infringement on account of any use which the purchaser may make in "*the making of the motion picture version thereof, the distribution, exhibition or other disposition of such motion picture versions*." And again, in the same article of the contract, the following language appears: "The warranties contained in this article apply only to the material used in such motion picture versions . . ."

A cogent question which might be asked here is: "If the parties intended that radio rights pass under the contract, then why, in the warranty clauses, was there not a war-

rancy exacted from the author with respect to radio rights?" or, putting the question in another way, "Why is the warranty limited only to motion picture rights?" The best answer to these questions is that it was never intended that the radio rights should pass, for certainly if such was the intention of the parties, a warranty would have been exacted from the author, giving the purchaser the same protection with respect to radio rights as it had with respect to motion picture rights.

It is entirely possible that the drafters of this printed form of contract may have anticipated that with the advance and development of the science of radio, a time might come when the motion picture theatre as it is now known might become an institution of the past, and that motion pictures, by which is intended *the actual film thereof*, would be shown to the public by broadcasting, through television or otherwise, but over the air, what the public now sees and hears while occupying a seat in a theatre. Or the drafters of the contract may have anticipated that motion pictures would be thrown upon a screen in what may be termed here a "master studio or theatre," and from such master studio or theatre be broadcast to other theatres throughout the country, by radio or television. The anticipation of such conditions is not too far-fetched, and these, in the opinion of the writer, are the reasons for which the language with respect to broadcasting by radio and television is included within the contract.

We submit that, by reason of the general language running throughout the entire contract, it is obvious that the parties did not intend to license general broadcasting rights thereunder, and that the right to explain the limitations of the grant by reference to the general language is permitted under Section 1068 of the Civil Code of the State of California:

“If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.”

In our “Statement of Case” previously set out in this brief, we referred the court to the fact that the license agreement was prepared by Columbia Pictures Corporation of California, Ltd upon its own printed form. [Tr. pp. 44-45.]

If, therefore, any ambiguity exists in this contract, as we insist that it does, then the contract should be interpreted most strongly against appellees, for under the provisions of Section 1654 of the Code of Civil Procedure of the State of California, it is provided that “In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist . . .”

For the reasons above assigned, appellant urges that not only did articles (1) and (3) of the contract prohibit the licensing of this particular broadcast, but its general language did likewise.

II.

The Trial Court Erred in Denying Appellant the Right to Introduce as Evidence in the Case Plaintiff's Exhibit 1 for Identification.

It was stipulated [Tr. pp. 227-228] that the contract so offered in evidence was one from time to time used by Columbia Pictures Corporation purporting to assign *all rights* when it was Columbia Pictures Corporation's intention to take an assignment of all rights to a dramatic composition. Counsel for defendants objected to the introduction of this evidence upon the ground that "it is entirely incompetent in connection with this case . . ." [Tr. p. 228.]

"The Court: I don't think that is important. Mark it for identification."

Regardless of the fact that the court's ruling was a rather informal one, it nevertheless follows that the document was not permitted to be introduced in evidence and plaintiff was, therefore, deprived of its evidentiary value.

It now must be obvious that the interpretation of the license agreement with respect to the meaning of the expression "*motion picture version*" is not so clear as to prohibit the use of collateral matter as an aid to interpretation, if in fact such collateral matter would be of value or assistance in arriving at a proper interpretation.

The law is clear that where the terms of a contract are ambiguous parol evidence is admissible to explain the uncertainty.

Branch v. Bekins Van & Storage Company. 106 Cal. App. 623, 290 Pac. 146.

In the case of *Lewis Publishing Company v. Henderson*, 103 Cal. App. 425, 284 Pac. 713, the court allowed extrinsic evidence to aid the interpretation of the language used in the contract. In this case defendants' testatrix agreed to buy a set of books containing portraits of herself and her husband reproduced from engraved steel plates. The evidence showed that different kinds of plates of different values were then in use. Inasmuch as the written memorandum did not specify the kind to be used, extrinsic evidence was admissible to explain the apparently ambiguity and to show what the parties intended thereby. In the same manner, we believe, the trial court should have allowed in evidence Plaintiff's Exhibit 1 for Identification, which showed the form of contract used by the defendants when they intended to obtain broadcasting rights. Certainly the contract used is ambiguous with respect to the meaning of "*motion picture version*," and the offered contract throws light on this question.

It has been held that even where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning, but at the same time consistently admits of two interpretations, according to the subject matter in the contemplation of the contracting parties, that, even there, parol or extrinsic evidence is admissible to explain the contract.

Jenny Lind Company v. Bower & Company, 11 Cal. 194;

Shelley v. Byers, 73 Cal. App. 44, 238 Pac. 177;

Gilde v. Schuster, 83 Cal. App. 537, 257 Pac. 121;

Isenberg v. Salyer, 62 Cal. App. (2d) 938, 145 Pac. (2d) 691.

Had Plaintiff's Exhibit 1 for Identification been received in evidence, the trial court would have had before it a printed form of contract which was admittedly used and employed by defendant Columbia Pictures Corporation of California, Ltd. where it sought to acquire all rights from an author, including general broadcasting rights.

As pointed out in an earlier part of this brief, in article I, subdivision B., we called the court's attention to the contrast in the language used in the two contracts, to wit: the license agreement and Plaintiff's Exhibit 1 for Identification. We shall not repeat that argument here and shall add only at this point that we know of no better means by which the court could have ascertained the intent of the parties, with respect to the interpretation of the disputed phrases, than by actually seeing the language employed in a printed form of contract, prepared by the same parties, where they really intended to acquire all of the author's rights, including broad radio rights.

We submit that Plaintiff's Exhibit 1 for Identification was of extreme evidentiary value to appellant, plaintiff in the trial court, in establishing his interpretation of the license agreement; and appellant contends that Plaintiff's Exhibit 1 for Identification should have been admitted in evidence by the trial court, and the court's refusal to admit the same constituted prejudicial error and is cause for reversal of the trial court's judgment.

It is submitted, therefore, in conclusion, that this court in view of the foregoing arguments, and the state of the record presented on this appeal, should reverse the judgment of the trial court, should order judgment to be entered in favor of appellant for his costs, and should remand the cause to the trial court for the sole question of determining the issue of damages.

Respectfully submitted,

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Dated May 18, 1945.